No. 82-912

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF *AMICUS CURIAE* MOBIL CORPORATION IN SUPPORT OF APPELLANT, FEDERAL COMMUNICATIONS COMMISSION

Of Counsel:
F. W. DIETMAR SCHAEFER
MOBIL CORPORATION
150 East 42nd Street
New York, New York 10017

LARRY S. SOLOMON
KELLER & HECKMAN
1150 - 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-1134

Attorney for Amicus Curiae, Mobil Corporation.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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INTRODUCTION

This case is a review of a decision by the United States District Court for the Central District of California which held unconstitutional that portion of 47 U.S.C. §399 (West Supp. 1982) (hereinafter "Section 399") which prohibits noncommercial educational broadcasting stations which receive funding from the Corporation for

Public Broadcasting from "editorializing."[1] Section 399 provides: "No noncommercial educational broadcasting station which receives a grant from the Corporation under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office."

The opinion of the District Court is reported at 547 F. Supp. 379.

The question presented in this case is whether Section 399, which prohibits "editorializing" by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting, violates the First Amendment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252.

Mobil Corporation is filing this brief *amicus curiae* in support of appellant, Federal Communications Commission, with the consent of the parties, as provided for in the Rules of this Court.

I. INTEREST OF *AMICUS CURIAE* MOBIL CORPORATION

Mobil Corporation (herein referred to as "Mobil") is a corporation organized and existing under the laws of the State of Delaware. Its wholly-owned, principal operating subsidiary is Mobil Oil Corporation, a New York corporation. In addition, Mobil owns Container Corporation of America and Montgomery Ward and Company, Inc. and its subsidiaries.

Mobil has a continuing interest in preserving the integrity of noncommercial educational broadcasting or, as it

[1] Section 399's prohibition of editorializing means only that public stations may not broadcast editorials "representing the opinion of the management of such station." Public stations are otherwise

[footnote continued]

is more commonly called, "Public Broadcasting,"[2] For over a decade, Mobil has been a grantor or underwriter of substantial funds directly or indirectly made available to individual public television broadcast stations. These grants have made, and continue to make possible such well known and well accepted programs as the "Masterpiece Theatre" and "Mystery" series, among others, which are aired over the Public Broadcasting System (hereinafter referred to as "PBS").[3]

Mobil has reason to believe that its grants have made a unique cultural contribution to American viewing audiences by making available quality educational programming that would not otherwise have been produced or shown in the United States. This genre of programming has become an important educational, cultural and entertainment facet of American life, as envisioned by the framers of the Public Broadcasting Act, and Mobil is therefore committed to this undertaking.

Mobil's interest in this case rests on two main premises: (1) that Section 399's prohibition against public stations endorsing any editorial view aired by such a station as its own viewpoint prevents public broadcasters from becoming or being perceived as a propaganda organ for the gov-

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free to editorialize and broadcast a "balanced, fair and objective presentation of controversial issues." *See infra* notes 37-42 and accompanying text.

[2]The terms "noncommercial educational broadcasting" and public broadcasting" will be used interchangeably throughout this brief. Public broadcasting was established by the enactment of the Public Broadcasting Act of 1967 (codified at 47 U.S.C. § §390 et seq.), an act which created the Corporation for Public Broadcasting (CPB) and authorized it to fund various programming activities of local public broadcast stations licensed by the Federal Communications Commission through allocations from Congress.

[3]PBS is a nonprofit membership corporation which distributes public, noncommercial television programs to its members.

ernment or for any other special interest; and, (2) that Section 399's prohibition of public stations' endorsement of any editorial as their own viewpoint reduces the possibility that a government-supported position will unduly influence and chill the free exchange of ideas intended to be fostered by the First Amendment.

The phenomenal impact of television on the American viewing public cannot be denied. Therefore, Mobil submits that there is a danger that the editorial viewpoints endorsed by public stations which are dependent upon the federal government for a significant portion of their revenues will be perceived by the public as at least approved by the federal government if not a statement of the government's position on the issue in question. Furthermore, Mobil is of the view that public broadcasters receiving significant funding from tax dollars should not have the right, on the one hand, to use the public airwaves pursuant to a license issued by the Federal Communications Commission, and, on the other hand, to couple this privilege with the right to endorse specific political or social views. Mobil believes that public broadcasting stations are likely to lose private financial support from both corporate contributors and the public if they become involved in the business of endorsing editorial views.

Contrary to the lower court's holding, experience demonstrates that reliance on the Fairness Doctrine is of little or no assistance in efforts to invoke First Amendment rights of free expression. In addition, with the persistent and many-faceted attacks on the Fairness Doctrine and Equal Time provisions, and the broadcasters' demand for absolute First Amendment freedoms for themselves to the exclusion of all others, this Court should not lose sight of the First Amendment rights of persons other than broadcasters. The lower court would have this Court believe that Section 399 presents only a simple question

of violation of broadcasters' First Amendment rights. This is not the case. There are other significant First Amendment rights at stake.

For the reasons hereinafter set forth, Mobil respectfully submits that the United States District Court for the Central District of California erred on legal, technical, and policy grounds in finding the editorializing prohibition of Section 399 to be unconstitutional.

SUMMARY OF ARGUMENT

The court below erred in finding the Section 399 prohibition of "editorializing" unconstitutional because it did not apply the proper standard of review. The lower court misinterpreted precedent concerning application of the compelling interest test because it improperly believed that there is only one standard of review appropriate for analysis of challenges brought under the First Amendment. The lower court also erred by refusing to recognize that the broadcast medium has always been treated uniquely: the Supreme Court has held that broadcasters have limited First Amendment rights which must be balanced against the public's First Amendment rights.

The Supreme Court has determined that regulations, such as the one currently under review, which only incidentally restrict First Amendment expression in furtherance of a governmental purpose unrelated to speech, are constitutional if they satisfy the criteria enumerated in *United States v. O'Brien* and its progeny. An application of this test to the facts and circumstances surrounding the prohibition of "editorializing" establishes that the prohibition is constitutional. The governmental interest in enacting the prohibition of "editorializing" was intended to preserve the integrity of public broadcasting and was unrelated to the suppression of free speech. The prohibition serves a substantial, if not compelling government interest by preventing public broadcasting stations from becoming government propaganda tools. The

incidental restriction on alleged First Amendment freedoms created by the prohibition of "editorializing" is no greater than is essential, and it was within the constitutional power of the government to create the prohibition.

If the Supreme Court does not reverse the lower court's decision invalidating the first provision of Section 399 which prohibits "editorials", enforcement of the second provision of Section 399 will be constitutionally impossible. The second provision of Section 399 prohibits public broadcasting stations from supporting or opposing candidates for political office. Because editorial endorsements may be construed as support for or opposition to candidates, enforcement of the prohibition against endorsement of candidates will necessitate unconstitutional content control. Administrative agencies and courts will be forced to distinguish between permissible editorials and editorials which support or oppose candidates.

If the Supreme Court does not reverse the lower court's decision, a number of practical difficulties will arise. Public broadcasting stations will have to spend significant amounts of their limited resources defending themselves in administrative proceedings and lawsuits initiated by candidates seeking to prevent the airing of editorials which can be construed as support for opposing candidates. Additionally, public stations may be compelled under the Equal Time provisions to provide an opportunity for candidates or their spokesmen to appear on the air. Such presentation of rebuttals could only occur at expense to and in frustration of public stations' primary purposes, the production and broadcasting of cultural and educational programming.

Finally, unless the lower court's decision invalidating the prohibition of editorial endorsements by public stations is reversed, there is a danger that their positions will be perceived by the public as either approved by the gov-

ernment, or as a statement of the government's position. The Fairness Doctrine will provide no remedy for this situation. The Fairness Doctrine will not assure any balance in the presentation of viewpoints, contrary to the lower court's belief, because the public broadcasters will retain almost exclusive control over the selection of issues and viewpoints to be presented. Because of the perceived government endorsement of viewpoints presented over public broadcasting stations, and because the public broadcaster has almost exclusive control over what is aired, there will not be the kind of uninhibited, robust and wide open exchange of views to which the public is constitutionally entitled.

II. ARGUMENT

A. THE COURT BELOW ERRED IN FINDING SECTION 399 UNCONSTITUTIONAL BECAUSE IT DID NOT APPLY THE PROPER STANDARD OF REVIEW

1. Misinterpretation of Precedent

The lower court's reasoning, if carried to its logical conclusion, would admit of only a single analysis of the constitutionality of regulations restraining First Amendment expression. While the court admitted that Section 399 is merely a restriction on the means by which issues of public importance are debated,[4] it analyzed the Sec-

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[4] League of Women Voters of California v. FCC, 547 F. Supp. 379 (C.D. Cal. 1982). The court stated that: "Despite this narrow construction of §399, it cannot be denied that the ban on editorializing limits the means by which certain noncommercial licensees may participate in the debate of issues of public interest and importance . . . ." *Id.* at 383. Consequently, Section 399 does not prohibit the expression of views on controversial issues of public importance, provided the surrounding facts and circumstances do not indicate that such views are intended as the official opinion of the public broadcast station. This is the only logical interpretation of Section 399 in light of the expressed congressional policy of fostering "a vital public affairs medium" in public broadcasting and the

[footnote continued]

tion as if its purpose is to prevent the discussion of public issues altogether.[5] To the contrary, this Court has always distinguished between direct limitations on the content of speech[6] and limitations which are only incidentally directed at speech (*i.e.* limitations which further a governmental purpose unrelated to speech). The lower court completely ignored this established distinction and incorrectly applied the compelling interest standard.

Rather than limiting its analysis to the compelling interest test, the lower court should have considered other judicial standards of review and applied the one appropriate to the type of incidental restriction involved here. Instead of trivializing the First Amendment by adopting an absolutist interpretation of the restrictions it places on government regulation of free expression, this Court has developed a multi-tiered analysis of the constitutionality of such statutes. A law which is "directed at speech itself" must be narrowly drawn and serve a compelling

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specific prohibition against FCC censorship in Section 326 of the Communications Act (47 U.S.C. §326), Complaint of Accuracy in the Media, 45 F.C.C. 2d 297, 302 (1973).

[5] This Court has held that "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." Konigsberg v. State Bar of California, 366 U.S. 36, 50-51 (1961).

[6] In First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978), this Court held that where "a prohibition is directed at speech itself" a compelling governmental interest must be shown. This Court has also held that a compelling governmental interest must be shown where speech is regulated on the basis of its content. *See,* Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 277 (1981); Carey v. Brown, 447 U.S. 455, 461 (1980); Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 96 (1972). For a discussion of this Court's opinions concerning incidental restrictions on speech which must be supported by a substantial governmental interest, *see infra* notes 17-23 and accompanying text.

state interest.[7] A law which incidentally limits First Amendment freedoms must be within the constitutional power of the government, further an important or substantial governmental interest which is unrelated to the suppression of free speech, and restrict alleged First Amendment freedoms no more than is essential to the furtherance of such interest.[8] A restriction that regulates only the time, place or manner of speech may be imposed so long as it is reasonable.[9] Finally, this Court has recognized the unique characteristics of the broadcast medium and developed a balancing test applicable to First Amendment rights of broadcasters and the public.[10] Because the prohibition against public stations adopting an editorial view as their own only incidentally restrains broadcasters' speech, and because broadcasting has never been protected by the full panoply of First Amendment protections, the lower court should have demanded only that a substantial government interest be demonstrated.

The lower court relied on *Consolidated Edison Co. v. Public Service Comm. of New York*, 447 U.S. 530 (1980) and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765

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[7] Bellotti, *supra* note 6 at 786.

[8] United States v. O'Brien, 391 U.S. 367, 377 (1968), *cited in* NAACP v. Claiborne Hardware Co., 452 U.S. 61, 101 S.Ct. 2176, 2183 n. 7 (1981). In O'Brien the court stated that: "We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377.

[9] Consolidated Edison Co. v. Public Service Commission of New York, 477 U.S. 530 (1980), *cited in* U.S. Postal Service v. Council of Greenburgh, 453 U.S. 114, 101 S.Ct. 2676, 2686 (1981); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559, 2564 (1981).

[10] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

(1978) in finding Section 399 unconstitutional. Granted, if Section 399 actually involved a direct restriction on the discussion of public issues, the holdings in these two cases would be appropriate. However, because the instant case involves only a restriction on the endorsement of a view by a public broadcaster and not a prohibition on the discussion of public issues, the lower court's reliance on these holdings is misplaced. In both *Consolidated Edison* and *Bellotti*, the Supreme Court said in dictum that only a substantial government interest would have to be demonstrated to establish the constitutionality of incidental restrictions on free speech, although the statutes under analysis in both cases directly restricted free speech and were not justified by a compelling interest. The lower court failed to take note of this distinction and misapplied the holdings of the two cases.

2. The Broadcast Medium Has Been Treated Uniquely Because Of Its Nature And There Is No Reason To Abandon Prior "Balancing" Considerations

Completely dismissing Supreme Court precedent which establishes the unique treatment of broadcasters' free speech rights, the lower court incorrectly held that Section 399 can survive scrutiny under the First Amendment only if it meets the stringent compelling interest standard.[11]

This Court has recognized that "because the broadcast media utilize a valuable and limited public resource" they "pose unique and special problems not present in the traditional free speech case." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973). Justice Marshall, writing for the majority in *FCC v. Nat'l Citizens Committee for Broadcasting*, stated that it is a "fundamental proposition that

[11] League of Women Voters, 547 F.Supp. at 384.

there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.' " 436 U.S. 775, 799 (1978).

This Court has observed that First Amendment issues regarding broadcast licensees should be analyzed in light of the congressionally established statutory and regulatory scheme:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of *all* concerned. *Columbia Broadcasting System*, 412 U.S. at 102. (emphasis added).

Such an analysis demonstrates that Congress created a regulatory system which accommodates the First Amendment interests of the public and of the private broadcast licensees. In establishing its legislative scheme for the regulation of the broadcast medium, Congress was cognizant of the fact that the nation's airwaves are a limited public resource not subject to private ownership. Thus, in enacting a regulatory scheme for the broadcast medium, Congress was sensitive to the need to protect the rights of the public.[12] The purpose of the First Amendment in the context of broadcasting is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

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[12] Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).

Although a broadcast licensee does possess a large measure of journalistic freedom, that freedom is not coterminous, for example, with that exercised by a newspaper. "A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.' " *Columbia Broadcasting System*, 412 U.S. at 118.[13] Broadcasters consistently have not been accorded the same First Amendment rights as newspaper publishers for that very reason.[14] Thus, although the First Amendment has been held to protect newspaper publishers from being required, for instance, to print the replies of those whom they criticize,[15] it does not afford any such protection to broadcasters. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In fact, pursuant to *Red Lion*, *supra*, in matters involving personal attacks the broadcasters must give reasonable reply time to the victims.[16]

Because of the unique nature of the broadcast medium, and based on the fact that there are several established standards for reviewing legislation concerning First

[13] A demonstrably assured historical meaning of the First Amendment is that government may not generally treat publication as a privilege to be indulged only on condition of a prior license. A prior license, however, is the foundation of the 1934 Communications Act as no one can broadcast without a license, and licenses are issued by the Government to relatively few applicants who, the FCC finds, will serve the public interest. Furthermore, licensees must continue to serve the public interest or their licenses may be revoked. *See, e.g.*, 47 U.S.C. §§309(a) and 312. Any applicant for a broadcast facility is completely aware of this proposition, and accepts a license conditioned upon it. The political editorializing and personal attack access obligations were upheld in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), because such regulations promoted, in the Court's opinion, First Amendment rights of the greatest importance, *i.e.*, that of the general public "to receive suitable access to social, political, esthetic, moral and other ideas and experience." *Id.* at 389-390.

[14] FCC v. Pacifica Foundation, 438 U.S. 726, 748.

[15] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[16] *See also*, 47 CFR §73.121.

Amendment rights, the lower court erred by holding that the only standard of review available to the court was the compelling interest standard.

B. A REGULATION WHICH ONLY INCIDENTALLY RESTRAINS FIRST AMENDMENT EXPRESSION IN FURTHERANCE OF SUBSTANTIAL GOVERNMENTAL INTERESTS SHOULD BE ANALYZED UNDER A TEST LIKE THAT ESTABLISHED IN *UNITED STATES V. O'BRIEN*

1. The *O'Brien*-Type Test Is Proper Because Section 399 Only Incidentally Restrains Speech

The United States Court of Appeals for the District of Columbia Circuit recently used the test announced by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968), to analyze the constitutionality of a former provision of Section 399.[17] The court stated that the threshold for applying the *O'Brien* test is that a statute imposes at least incidental restraints on First Amendment freedoms.[18]

A number of this Court's most recent opinions also indicate that the *O'Brien* test is appropriate for analysis of sections of regulatory statutes which incidentally re-

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[17] Community-Service Broadcasting v. FCC, 593 F.2d 1102 (D.C. Cir. 1978). The Court of Appeals for the District of Columbia used both the four-part O'Brien test and a compelling interest test to evaluate a provision in Section 399 which required public stations to keep a recording of all broadcasts "in which any issue of public importance is discussed." 593 F.2d 1102, 1114 (D.C. Cir. 1978). The compelling interest test applied to this provision because it was "directed at speech itself" in the sense that it regulated the content of only those broadcasts which had to do with "issues of public importance." The Circuit Court indicated, however, that, but for the fact that this provision regulated the content of broadcasts, the four-part O'Brien test is the appropriate analysis to use in determining the constitutionality of provisions in Section 399. The O'Brien test is the correct one to use because Section 399 imposes only "incidental restraints on First Amendment Freedoms." *Id.* at 1114.

[18] *Id.* at 1114.

strict First Amendment expression in furtherance of important and substantial governmental objectives. For example, in *NAACP v. Claiborne Hardware Co.*, this Court stated that "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances."[19] In *Schad v. Borough of Mt. Ephraim*, this Court observed that regulations which are "narrowly drawn to avoid unnecessary intrusion on freedom of expression" should be analyzed under the *O'Brien* test.[20] In *Consolidated Edison Co. v. Public Service Commission*, this Court stated that "[t]he *O'Brien* test applies to regulations that incidentally limit speech where the 'governmental interest is unrelated to the suppression of free expression . . .' "[21] In *First National Bank of Boston v. Bellotti*, this Court indicated that the *O'Brien* test is appropriate where a governmental regulation protects "from an evil shown to be grave, some interest clearly within the sphere of government concern."[22] In light of these indications by the Supreme Court of the sort of regulation which should be analyzed under the *O'Brien* test,[23] this Court should

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[19] ___ U.S. ___, 102 S.Ct. 3409, 2425 (1982).

[20] 452 U.S. 61, 101 S.Ct. 2176, 2183 n.7 (1981).

[21] 447 U.S. 530, 541 n. 9 (1980).

[22] 435 U.S. 765, 786 n.23 (1978).

[23] In addition to these explicit applications of the O'Brien test, the Supreme Court has applied the Konigsberg rule that sections of general regulatory statutes which only incidentally restrict free speech may be found constitutional. *See supra* note 5. For example, the Supreme Court has twice held that sections of the National Labor Relations Act making it an unfair labor practice to boycott a secondary business impose "no unconstitutional restrictions upon speech protected by the First Amendment." NLRB v. Retail Store Employees Union, 447 U.S. 607, 609 (1980). In International Longshoremen's v. Allied International, 456 U.S. 212, 102 S.Ct. 1656, 1665 (1982), the Supreme Court held that since "[t]he labor laws reflect a careful balancing of interests... [and] there are many ways in which a union and its individual members may express

[footnote continued]

apply an *O'Brien*-type test in this case and require that the government demonstrate a substantial interest in maintaining the prohibition of endorsement by public stations of an editorial viewpoint.

2. An Application Of The Four-Part *O'Brien*-Type Test Demonstrates That the Section 399 Prohibition Against Public Stations' Endorsement Of Editorial Viewpoints Does Not Violate The First Amendment

a. The Governmental Interest In Enacting The Section 399 Prohibition Of "Editorializing" Was Unrelated To The Suppression Of Free Speech

An analysis of the legislative history discussing Section 399[24] reveals that Congress intended to further two objectives by prohibiting public stations from adopting an editorial viewpoint as their own. Congress intended to prevent public stations from becoming propaganda tools for the federal government or for any other donor of sig-

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their opposition to Russian foreign policy without infringing upon the rights of others" by violating the section of the Act barring secondary boycotts, the prohibition of secondary boycotts was not violative of the First Amendment. Likewise, since the Public Broadcasting Act reflects a careful balancing of interests, Section 399 should be evaluated under the four-part O'Brien test rather than a compelling interest test. Section 399 is not "directed at" public broadcasters' speech, but, instead, only incidentally restricts such speech as part of a larger regulatory scheme designed to ensure that public broadcasting stations are protected from pressure to adopt the editorial viewpoints of those sources of financial support upon which they are dependent.

[24] A determination of what the government interest is in connection with any statute requires a review of the legislative history created at the time of the law's enactment. The Circuit Court of Appeals for the District of Columbia recognized this principle in Community-Service Broadcasting v. FCC when it applied the "governmental interest *in its enactment*" was unrelated to suppression of free speech. 593 F.2d 1102, 1114 (D.C. Cir. 1978) (emphasis added).

nificant funding. Additionally, Congress intended to promote the effective use by public stations of their limited resources for the production of high quality educational and cultural programming.

The House Report on the Public Broadcasting Act of 1967 established the Congressional policy that " . . . educational stations must not be permitted to become vehicles for the promotion of one or another political cause, party or candidate."[25] The Senate adopted this policy and stressed that the probhition in Section 399 of "editorializing" is narrowly drawn and "limited to providing that no noncommercial educational broadcast station may broadcast editorials representing the opinion of the management of such station."[26]

The prohibition against public stations endorsing a viewpoint as their own was also intended to further the fundamental purposes behind the creation of the Corporation for Public Broadcasting and the Public Broadcasting System. In its statement of the purpose of the Public Broadcasting Act of 1967, the House Committee charged with analyzing the legislation identified three purposes; to provide funding for broadcast facilities, to provide funds "for cultural and educational programs of the highest quality so that the facilities provided under the bill can be productively utilized" and to provide for a study of instructional television.[27]

Notably, it was not a purpose of the Public Broadcasting Act of 1967 or of Section 399 of the Act to suppress free speech. Instead, the legislation had the positive goals of creating a new broadcasting system and supplying the "educational broadcasting stations" which would make

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[25] H.R. 572, *reprinted in* 1967 U.S. Code Cong. & Ad. News 1799, 1810.

[26] Conf. R. No. 7904, *reprinted in* 1967 U.S. Code Cong. & Ad. News 1834, 1835.

[27] *See supra* note 25 at 1799.

up the system "with programs of a diverse, cultural and educational nature."[28]

The prohibition against public stations adopting any editorial opinion as their own was the result of two Congressional conclusions. Congress concluded that there would be less risk that public stations would be subjected to pressure from the federal government or other important sponsors to promote a particular viewpoint if public stations could not editorialize.[29] In this sense, Section 399's prohibition of "editorializing" was an integral part of "a carefully balanced system of dual checks against political influence"[30] over public stations which were intended to be devoted to cultural and educational programming.

Additionally, it is apparent from the statement of the purposes of the Public Broadcasting Act that Congress had concluded that any editorializing by public stations could only occur at a cost to and in frustration of Congress' intention that public stations be committed to the production of cultural and educational programming.[31]

Neither of these Congressional conclusions was related to the suppression of free speech. In the alternative, the House Committee which studied the Public Broadcasting Act stated that "[i]t should be emphasized that this section [§399] is not intended to preclude balanced, fair and objective presentations of controversial issues by noncommercial stations."[32] Therefore, it is apparent from a thorough analysis of the legislative history of Section 399 that the governmental interest in prohibiting

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[28] *See supra* note 25 at 1810.

[29] *Id.*

[30] Community-Service Broadcasting, 593 F.2d at 1109.

[31] *See supra* note 25 at 1799.

[32] *See supra* note 25 at 1810.

public stations from adopting an editorial viewpoint as their own was only incidentally related to the suppression of free speech.

b. The Section 399 Prohibition On "Editorializing" Serves A Substantial, If Not Compelling, Government Interest

A thorough analysis of the legislative history of the Public Broadcasting Act reveals that Congress was quite concerned that public broadcasters remain politically neutral and not become propaganda organs for Congress or any other branch of the government. For example, during debate on the bill on the Senate floor, Senator Byrd expressed his "great fear of Government propaganda."[33] Senator Thurmond expressed a similar concern that the bill "could be used to develop and disseminate propaganda promoting the policies and programs of the Departments of Health, Education, and Welfare; Housing and Urban Development; Justice; Agriculture; Commerce; and so on. We would have propaganda designed to influence pending legislation, whether authorization or appropriation."[34] Representative Carter, who opposed the bill in committee but later voted for passage on the House floor, said that: "The thing that frightens us is the possibility of editorializing and controlling public opinion by a group, or a control group in Washington. That is what is of concern to most of us."[35] Representative Brotzman, minority member of the committee, asserted that "[t]he fear of Government control of programming was recurrent during consideration of this bill by my committee. In my mind it was and is a justifiable fear. However . . . I believe we were successful in adding

[33] 113 Cong. Rec. 12990 (1967).

[34] 113 Cong. Rec. 12992 (1967).

[35] Public Broadcasting Act of 1967: Hearings before the House Committee on Interstate and Foreign Commerce, 90th Cong. 1st Sess. 342 (1967).

amendments [including one prohibiting editorializing and endorsement of political candidates by noncommercial sations] which along with a reasonable degree of vigilance on the part of Congress—will prevent this corporation from becoming a Government propaganda tool."[36]

In light of the above analysis of legislative history, it is apparent that Congress had a substantial interest in enacting the prohibition against endorsements by public stations of editorial views: to ensure that public broadcast stations should not be permitted to endorse a particular position and thus give the impression of governmental endorsement of that position.

c. The Incidental Restriction On First Amendment Freedoms Created By The Section 399 Prohibition Of Editorializing Is No Greater Than Is Essential

An analysis of whether there is a less restrictive method by which Congress could have sought to protect public stations from being subjected to pressure to editorialize in favor of the interests of the federal government[37] or other important financial supporters, must begin by focusing on the narrowness of the restraint on First Amendment expression which Section 399 created. As construed by the Federal Communications Commission,[38] and as intended by Congress,[39] Section 399 does not pro-

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[36] 113 Cong. Rec. 26394 (1967).

[37] There are several ways in which the federal government could pressure public broadcasting stations to adopt an editorial viewpoint favorable to the government's interest. For example, the Federal Government could utilize the licensing process which is "itself . . . potential source of federal coercive power over all broadcasters" to pressure public stations into editorializing in favor of the government's interests, or at least, not against the government's interests. *See League of Women Voters of California v. F.C.C.*, 547 F.Supp. at 388.

[38] Accuracy in Media, *supra* note 4, at 45 F.C.C. 2d at 301.

[39] *Supra* note 26.

hibit public stations from editorializing as that activity is commonly understood. They may "introduce opinion into the reporting of facts."[40]

Section 399's prohibition of editorializing means only that public stations may not broadcast editorials "representing the opinion of the management of such station."[41] Public stations are otherwise free to editorialize and it was Congress' intent that, regardless of Section 399, public stations should broadcast "balanced, fair and objective presentations of controversial issues."[42]

There are compelling reasons why no narrower restriction is possible. To begin with, the only constitutional method available to Congress to prevent public stations from becoming "vehicles for the promotion of one or another political cause or candidate"[43] was to prohibit public stations from endorsing any editorial viewpoint as their own. Other alternatives for achieving this end would have resulted in restrictions clearly offensive to the First Amendment. For example, if Congress had allowed public stations to endorse certain viewpoints as their own, but found it necessary to prohibit endorsements which were "too political" or "unbalanced", enforcement of the prohibition would certainly be ruled unconstitutional as either an impermissible content regulation or prior restraint. Notably, these are the same constitutional problems that will arise if this Court finds the prohibition on public stations adopting an editorial viewpoint unconstitutional as discussed below. Therefore, due to the narrowness of Section 399's restraint on editorial freedom, and because of the unavailability of other effective or constitutional methods of protecting public stations from economic pressure or preventing them from

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[40] Webster's New Collegiate Dictionary (1978).

[41] *Supra* notes 38, 39.

[42] *Supra* note 26.

[43] *Supra* note at 25.

endorsing political candidates in violation of the other provision of Section 399, the prohibition of "editorializing" is no greater than is essential.

d. The Section 399 Prohibition Of "Editorializing" Is Within The Constitutional Power Of The Government

Congress has broad and sweeping power to regulate broadcasting as part of its authority over interstate and foreign commerce.[44] In order to regulate broadcasting, Congress created the Federal Communications Commission, an independent federal regulatory agency, and charged it with licensing the use of the airwaves.[45] The legitimacy of the FCC's regulation of broadcasters has been upheld by the Court on numerous occasions.[46] The Section 399 prohibition against the endorsement by public stations of editorial viewpoints is one small part of the court upheld regulatory framework Congress has created for broadcasting and is therefore within the constitutional power of the government.

e. Section 399's Prohibition Against Public Stations Adopting An Editorial Viewpoint As Their Own Is Constitutional

In light of this Court's determination that the constitutionality of regulations which incidentally restrain First Amendment expression should be analyzed under the type of test established in *United States v. O'Brien*, and because the Section 399 prohibition of "editorializing" satisfies all the *O'Brien* criteria, it is apparent that the prohibition is constitutional.

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[44] U.S. Const. art. I, §8, cl. 33.

[45] *See* Red Lion, 395 U.S. at 379, 394.

[46] *Id.* at 394; *See also* National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Regents of University System of Georgia v. Carroll, 78 Ga. App. 292, *aff'd* 338 U.S. 586 (1950).

C. BECAUSE EDITORIALS MAY BE CONSTRUED AS SUPPORT FOR OR OPPOSITION TO CANDIDATES FOR POLITICAL OFFICE, A NUMBER OF CONSTITUTIONAL AND PRACTICAL DIFFICULTIES WILL ARISE IF PUBLIC BROADCASTING STATIONS ARE ALLOWED TO "EDITORIALIZE"

1. It Is Impossible To Draw A Distinction Between The Endorsement Of Editorial Views and Support For, Or Opposition To, A Political Candidate

Section 399, as amended in 1981[47] provides: "No noncommercial educational broadcasting station which receives a grant from the Corporation [for public broadcasting] under Subpart C of this Part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office."

The first provision in Section 399 prohibits public broadcast stations receiving CPB funding from endorsing an editorial viewpoint. The second provision of the section prohibits *all* public stations from supporting or opposing a candidate for political office. Notably, only the constitutionality of the prohibition against "editorializing" is presently before this Court; the prohibition against support for or opposition to candidates for political office will remain in force regardless of the outcome of this litigation.

If the lower court decision is upheld, either Congress or the Federal Communications Commission will be faced with the impossible task of fashioning a test that distinguishes between permissible editorials and editorials which are, in reality, partisan because they so closely reflect a particular candidate's platform. The impossibility of this task stems from the fact that "[t]he editorial

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[47] 47 U.S.C. §399 (Supp. 1983) (amending 47 U.S.C. §399 (1980)).

process is inherently subjective . . . [and a] decision appearing to some persons as serving the 'public interest' may well appear to others as 'political'."[48] The application of such a test will involve the government in control over the content of editorials and such control has consistently been found to be abhorrent to the First Amendment.[49]

Aside from this constitutional problem, litigious candidates and their election committees will petition the FCC for cease and desist orders against editorials by public stations which appear to support or oppose particular candidates. Candidates already regularly petition and sue the FCC for equal time on the air.[50] The Federal Election Commission is also petitioned by candidates for injunctions because even issue advertisements supporting or opposing certain political views could be considered "contributions" or "negative contributions" in violation of the Federal Election Campaign Act.[51] *See, e.g., In the Matter of Mobil Oil Corporation*, MUR 319(76). Therefore, it is reasonable to believe that the FCC will be asked to enforce Section 399's prohibition of public broadcast stations supporting or opposing political candidates when such stations have engaged in the apparently permissible form of editorializing.

Should the FCC become involved in content regulation and determine that a public station's editorials do support one candidate over another, it may order that equal time be allotted to the aggrieved candidate for rebuttal.

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[48] Muir v. Ala. Educational Television Comm., 656 F.2d 1012, 1023 (5th Cir. 1981), *aff'd on rehearing* 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1274 (1983).

[49] *Supra* note 6.

[50] See, Kennedy for President Comm'n. v. F.C.C., 636 F.2d 417 (D.C. Cir. 1980); CBS, Inc. v. FCC, 629 F.2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981).

[51] 2 U.S.C. § 441b.

The FCC may threaten to revoke the station's license if it does not comply with the equal time order.[52] Compliance with such an FCC order will impose a high cost on public stations by absorbing some portion of their broadcasting hours which could otherwise be spent airing cultural and educational programs. In addition to becoming targets of administrative proceedings during elections, candidates will seek injunctions by directly suing public stations which allegedly violate Section 399 by indirectly supporting and/or opposing candidates. Defense of such suits will undoubtedly deplete public stations' limited finances.

The judiciary will be repeatedly called upon to determine whether a particular editorial is too "political" to be allowed under Section 399. Appeals from administrative attempts to fashion a workable distinction between permissible and impermissible editorials will "necessarily involve unacceptable and undesirable judicial intrusion [in] the editorial process."[53] This conversion of "courts into super editors"[54] would be unconstitutional because courts may not "dictate to the press [or other media] . . . the slant of its editorials." *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 262 (1974). (White J. concurring). Nevertheless, such a conversion of courts into "super editors" is a predictable and not speculative result of allowing public broadcasting stations to "editorialize."

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[52] 47 U.S.C. §312(a) (7).

[53] Muir, 656 F.2d at 1023.

[54] *Id.*

2. The Fairness Doctrine Is Not Sufficient To Assure The First Amendment Rights Of The Public To Balanced Programming As The Lower Court Believed Nor Will It Prevent Undue Influence On And By The Public Broadcaster.

The lower court's apparent confidence that the Fairness Doctrine[55] will assure the presentation of balanced viewpoints if public broadcast stations are allowed to "editorialize" was based merely on the judge's erroneous beliefs.[56] There are two major errors in assuming the Fairness Doctrine alone will provide for the presentation of balanced viewpoints on public broadcast stations. First, there is an important distinction between presenting views and endorsing views. Once the public broadcaster has endorsed a position, there will be a danger that the position will be perceived by the public as either approved by the government, or as a statement of the government's position. The Fairness Doctrine will not eliminate this danger.

Secondly, the realities involved in the application of the Fairness Doctrine dictate that the broadcast licensees have virtually complete discretion "to determine what issues should be covered, how much time should be allocated, which spokesman should appear, and in what format."[57] Consequently, the Fairness Doctrine does not, in any sense, require broadcast licensees to allow other

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[55] In the Matter of Editorializing By Broadcast Licensees, 13 F.C.C. 1246 (1949); Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 *Fed. Reg.* 10415 (1964). *See also*, 47 U.S.C. §315(a).

[56] League of Women Voters, 457 F.Supp. at 386.

[57] Notice of Inquiry: The Handling of Public Issues Under the Fairness Doctrine and the Public Interest of the Communications Act, 30 F.C.C. 2d 26, 27-28 (1971).

persons to express their opinions over the licensees' facilities.[58]

The lower court was obviously confusing the Fairness Doctrine principles with the Commission's "personal attack" and "political editorializing" rules which were upheld in *Red Lion*, 395 U.S. 367 (1969).[59] These provisions are distinguishable from the Fairness Doctrine provisions because the Fairness Doctrine provisions do not provide any limited right to the airwaves. Rather, they only require that the licensee present opposing views on controversial issues of public importance at some point in its *overall* programming.[60] Therefore, as Justice Brennan, with whom Justice Marshall concurred, noted in a dissenting opinion in *Columbia Broadcasting System:*

> Broadcasters may meet their fairness responsibilities through presentation of carefully edited news programs, panel discussions, interviews, and documentaries. As a result, broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation, and perhaps most important, who shall speak. I can only conclude that the Fairness Doctrine, standing alone, is insufficient—in theory as well as in practice—to provide the kind of "uninhibited,

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[58] The Fairness Doctrine must be distinguished from the "equal time" requirement which provides that when one political candidate is given air time, other candidates for the same office must be given equal time.

[59] 47 CFR §73.121. The personal attack rule essentially provides that when an "attack" is made on a person's character, he must be notified by the broadcaster and be given an opportunity to respond. The political editorializing rule generally provides that the endorsement of a candidate creates the necessity of offering other candidates an opportunity to respond.

[60] *See supra* n. 55.

robust, and wide-open" exchange of views to which the public is constitutionally entitled.[61]

Even in those very rare instances where the Federal Communications Commission finds that a broadcaster acted unreasonably, in bad faith, or both,[62] it will direct the broadcaster to meet its fairness obligations through additional programming, but the type of programming will not be specified by the Commission and is left to the discretion of the broadcaster.[63]

It should also be noted that there have been strong and persistent attempts to eliminate all or part of the Fairness Doctrine. For example, Congress has proposed legislation to eliminate the Fairness Doctrine,[64] and the FCC has endorsed legislation that would eliminate the Fairness Doctrine.[65] Similarly, the FCC has recently adopted a

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[61] 412 U.S. 94, 186-187.

[62] Former Commission Chairman Ferris estimated that the FCC receives about 5,000 fairness complaints and inquiries each year. Of these, 97 percent required no license response, so the FCC did not even alert the licensee involved of the existence of the complaint. According to Ferris, in an average year only 15-20 complaints are resolved in a manner unfavorable to the broadcasters. First Amendment Clarification Act of 1977: Hearings on S.22 before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 95th Cong., 2d Sess. 19 (1978) (statement of Charles D. Ferris, Chairman FCC); *See also*, American Security Council Educational Foundation v. FCC, 607 F.2d 438 (D.C. Cir. 1979) *cert. denied* 414 U.S. 1013 (1980), wherein Judge Wilkey, with whom Judges McKinnon and Robb joined in dissenting, indicated that it may be virtually impossible to prove a Fairness Doctrine complaint because of the requirement of *prima facie* evidence necessary to sustain the complaint. 607 F.2d at 475.

[63] *See supra* n. 55.

[64] H.R. 4780, 97th Cong., 1st Sess. (1981); H.R. 4781, 97th Cong., 1st Sess. (1981).

[65] *See, e.g.*, Letter from Mark S. Fowler, Chairman, Federal Communications Commission to the Vice President, United States Senate (Oct. 2, 1981) (discussing FCC proposals to eliminate Section 315).

Notice of Proposed Rule Making concerning the repeal or modification of the personal attack and political editorial rules.[66] This action is in response to a petition by the National Association of Broadcasters alleging that these provisions inhibit the presentation of controversial programming. Therefore, it is possible that the Fairness Doctrine may soon be extinct, or at least severely emasculated. The broadcasters, therefore, would have clearly "preferred" First Amendment rights and a virtual monopoly on what would be aired.[67]

In light of these practical limitations of the Fairness Doctrine and the likelihood that the Doctrine may soon be eliminated, it is apparent that the lower court's confidence that the Doctrine will somehow ensure the balanced presentation of editorials and eliminate the danger of public broadcast station "editorials" being perceived as statements of governmental viewpoints was unjustified.

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[66] Notice of Proposed Rule Making, In the Matter of Repeal or Modification of Personal Attack and Political and Editorial Rules, FCC Gen. Docket No. 83-484, adopted June 2, 1983.

[67] The Public Broadcasting Act does not provide any assurances of balanced programming either. In Accuracy in the Media, Inc., 521 F.2d 288 (D.C. Cir.): *cert. denied*, 425 U.S. 934 (1975), the Court considered the question of whether the FCC had jurisdiction to enforce against the CPB Section 396(g)1(A) which states that objectivity and balance should be encouraged. The Court stated that the provision "is not a substantive standard, legally enforceable by the agency or the courts." 521 F.2d at 297. The Court went on to state that the wording of the section supports this view, and that CPB is not required to provide programs with "strict adherence to objectivity and balance" but rather to "facilitate the full development of educational broadcasting in which programs... will be made available...." The Court therefore held that the FCC has no function in this scheme of accountability established by §396(g)(1)(A) and the 1967 Act in general other than that assigned to it by the Fairness Doctrine. *Id.* at 297.

III. CONCLUSION

For all of the above-stated reasons in the foregoing *amicus curiae* brief, the decision of the District Court should be reversed.

Respectfully submitted,

LARRY S. SOLOMON
KELLER & HECKMAN
1150 - 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-1134

Attorney for Amicus Curiae, Mobil Corporation.

Of Counsel:
F. W. DIETMAR SCHAEFER
MOBIL CORPORATION
150 East 42nd Street
New York, New York 10017